Supreme Court, U. S.
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IN THE

Supreme Court of the United States

October Term, 1979

No. 79-1444

FRANCES LETO ZANGRILLO,
Petitioner,

against

GORDON M. AMBACH, as Commissioner of Education of the State of New York, and the President and Board of Trustees of FASHION INSTITUTE OF TECHNOLOGY,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

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Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

Respondent Gordon M. Ambach, as Commissioner of Education of the State of New York, respectfully prays that the petition herein for writ of certiorari to the Court of Appeals of the State of New York be denied.

Opinions and Orders Below

The decision of the New York State Court of Appeals denying petitioner's motion for leave to appeal is reported at 48 NY 2d 611. The order of the Court of Appeals is annexed hereto as Appendix A.

Jurisdiction

The asserted basis of jurisdiction is 28 U.S. Code, Section 1257(3), based upon an alleged violation of petitioner's substantive and procedural due process rights under the Fourteenth Amendment to the United States Constitution.

Questions Presented for Review

1. Was the New York Court of Appeals correct when it held, in effect, that petitioner's appeal did not present any issue of an alleged deprivation of a constitutional or statutory right of petitioner?

2. Was the New York Court of Appeals correct when it held, in effect, that petitioner had selected the inappropriate forum in which to litigate her claim against the Fashion Institute of Technology?

Constitutional Provisions and Statutes Involved

Amendment XIV, Section 1, United States Constitution:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny

to any person within its jurisdiction the equal protection of the laws."

28 U.S. Code, Section 1257(3):

"Final judgments or decrees rendered by the highest court of a state in which a decision could be had, may be reviewed by the Supreme Court as follows: . . .

(3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States."

McKinney's Consolidated Laws of New York, Book 16 Education Law

§ 310. Appeals or petitions to commissioner of education and other proceedings

Any party conceiving himself aggrieved may appeal by petition to the commissioner of education who is hereby authorized and required to examine and decide the same; and the commissioner of education may also institute such proceedings as are authorized under this article. The petition may be made in consequence of any action:

1. By any school district meeting.

2. By any district superintendent and other officers, in forming or altering, or refusing to form or alter, any school district, or in refusing to apportion any school moneys to any such district or part of a district.

3. By a county treasurer or other distributing agent in refusing to pay any such moneys to any such district.

4. By the trustees of any district in paying or refusing to pay any teacher, or in refusing to admit any scholar gratuitously into any school or on any other matter upon which they may or do officially act.

5. By any trustees of any school library concerning such library, or the books therein, or the use of such books.

6. By any district meeting in relation to the library or any other matter pertaining to the affairs of the district.

6-a. By a principal, teacher, owner or other person in charge of any school in denying a child admission to, or continued attendance at, such school for lack of proof of required immunizations in accordance with section twenty-one hundred sixty-four of the public health law.

7. By any other official act or decision of any officer, school authorities, or meetings concerning any other matter under this chapter, or any other act pertaining to common schools.

Note: Subdivision 6-a added in 1979.

Statement of the Case

Petitioner is a faculty member of the Fashion Institute of Technology, which is a community college within the State University of New York. She was granted a maternity leave from February 1, 1963, which was extended until January 31, 1965. Upon her failure to return from maternity leave, petitioner was deemed to have submitted her resignation. The bylaws of the institution, which had provided for an unqualified right of reinstatement within ten years after the resignation of a faculty member, were amended prior to petitioner's maternity leave to provide that faculty members who resign shall be eligible for reinstatement in the same rank within ten years, and re-employment by the President within his discretion.

Petitioner returned to full-time teaching as an assistant professor at the institution in February of 1973. Thereafter, she commenced a grievance pursuant to the contract between the Fashion Institute of Technology and the teacher's collective bargaining unit, in which she alleged that she had been placed on the inappropriate step of the salary schedule for assistant professor upon her re-employment. Following the denial of the grievance at three different levels, petitioner commenced an appeal to the Commissioner of Education of the State of New York.

The Commissioner ruled that he did not have jurisdiction to determine petitioner's appeal because the statute authorizing him to determine appeals limits his jurisdiction to matters pertaining to the common school system of the State of New York and the Fashion Institute of Technology is not a part of the common school system of the State of New York.

Petitioner thereafter instituted a proceeding pursuant to Article 78 of the New York Civil Practice Law and Rules for judicial review of the Commissioner's decision. By decision dated March 3, 1978, Mr. Justice John T. Casey of the New York State Supreme Court, Special Term, County of Albany, affirmed the determination of the Commissioner, and directed the entry of judgment dismissing the petition to review. Mr. Justice Casey held that upon the record before him there was no indication that the Commissioner had been arbitrary or capricious in determining that the Fashion Institute of Technology was not within the common school system of the State of New York, and that accordingly, the Commissioner's decision with regard to his lack of jurisdiction to entertain the appeal pursuant to section 310 of the Education Law could not be set aside. Judgment was entered dismissing the petition on March 10, 1978.

Petitioner then appealed to the Appellate Division of New York State Supreme Court, Third Judicial Department. The Appellate Division unanimously affirmed the judgment of the Supreme Court at Special Term, without opinion, and with costs to the respondents. The order of affirmance of the Appellate Division was entered on June 4, 1979.

Petitioner moved for leave to appeal to the New York Court of Appeals pursuant to section 5602 of the Civil Practice Law and Rules. On December 17, 1979, the Court of Appeals denied the motion for leave to appeal with costs to respondents. The order of the Court of Appeals was entered on December 17, 1979.

ARGUMENT

POINT I

The judgment sought to be reviewed has an adequate basis in State law.

The judgment which petitioner seeks to have this Court review was based upon an interpretation of New York Education Law section 310, which confers jurisdiction upon the State Commissioner of Education to hear and determine appeals from the actions of certain public school officials.

The extent to which the Commissioner is authorized to adjudicate the rights of individuals who believe themselves to be aggrieved by the action of local school authorities is clearly a matter of State law, the decision of which by the highest court of the State must be accepted as controlling by this Court (*Grubb v. Public Utilities Commission*, 281 US 470 [1930]). The Commissioner's determination that he lacked jurisdiction to consider the merits of the appeal brought to him by petitioner necessarily involved the construction of a State statute, which has been upheld by the court of original jurisdiction and two appellate courts. It is not the function of this Court upon review of a decision of a State's highest court to construe a State statute contrary to the construction given it by the State's highest court (*Landmark Communications Inc. v. Virginia*, 435 US 829 [1978]; *Memorial Hospital v. Maricopa County*, 415 US 250 [1974]; *O'Brien v. Skinner*, 414 US 524 [1974]).

If, for the sake of argument, it is assumed that petitioner properly raised a Federal question in the courts below, it is nevertheless manifest that the judgment of

the New York Court of Appeals has an adequate and independent basis in State law. Consequently, this Court has no jurisdiction to consider the alleged Federal question which petitioner attempts to raise (*Fox Film Corp. v. Miller*, 296 US 207 [1935]; *Cramp v. Board of Public Instruction*, 368 US 278 [1961]; *Jankovich v. Indiana Toll Road Commission*, 379 US 487 [1965]; *Fay v. Noia*, 372 US 391 [1963]).

In essence, the judgment sought to be reviewed is based upon the legal premise that petitioner selected the wrong forum in which to pursue her alleged grievance against her employer. The judgment is not based upon a State court decision which was rendered to evade a constitutional issue (*Wolfe v. North Carolina*, 364 US 177 [1960]). It has been repeatedly held by this Court that a wrong choice of forum or remedy is an adequate State ground for a judgment which precludes review of a Federal question (*McQuade v. Trenton*, 172 US 636 [1899]; *Farson, Son and Co. v. Bird*, 248 US 268 [1919] *McCoy v. Shaw*, 277 US 302 [1928]; *Herb v. Pitcairn*, 324 US 117 [1945], Supp.-Op. 325 US 77 reh. den. 325 US 893; *Copperweld Steel Co. v. Industrial Comm.*, 324 US 780 [1945]; *Parker v. Illinois*, 333 US 571 [1948] reh. den. 334 US 813; *Edelman v. California*, 344 US 357 [1953]).

Petitioner's contention that she was obliged to bring an appeal to the Commissioner before pursuing her alleged Federal claim in either State Supreme Court or United States District Court is without merit. Her reliance upon the provisions of Section 2587, subd. 9 of the New York State Education Law is misplaced. That subdivision does provide for an appeal to the Commissioner by a person who has been granted tenure by the

Fashion Institute of Technology, when charges have been brought against such person and the Board of Trustees of Fashion Institute of Technology has fixed a penalty. The relevant portion of subdivision 9 of section 2587 reads as follows:

> "The board may reject, confirm or modify the conclusions of the trial committee, and the decisions of the board shall be final, except that any person aggrieved may review the determination of said board only by an appeal to the commissioner of education, as provided for by article seven of this chapter."

It is readily apparent that this provision for review by the Commissioner of a determination by the Board of Trustees of Fashion Institute of Technology concerning the punishment of a tenured teacher affords no basis for a conclusion that the Commissioner has jurisdiction to entertain the appeal of a teacher concerning the alleged failure of such board to appoint her to a full-time position upon her request for reinstatement. Petitioner has not been dismissed or disciplined by respondent board of trustees in accordance with the provisions of subdivision 9 of section 2587 of the Education Law.

Therefore, it is clear that petitioner was not compelled to select an appeal to the Commissioner to litigate her alleged Federal question claim against the Fashion Institute of Technology. She could have pursued the matter in either State Supreme Court or in United States District Court. Instead, she selected an appeal to the Commissioner to review the action of the governing body of an entity which is part of the State University of New York despite the well established decisional law holding that the Commissioner is not the appropriate forum for

the resolution of disputes pertaining to the State University of New York (*Matter of Bowen v. Allen*, 17 AD 2d 12, affd. w/o opinion, 13 NY 2d 663 [1963]; *Matter of Roode*, 9 Education Department Reports 65 [1967]). Clearly, petitioner had a reasonable opportunity to have the issue as to the claimed right heard and determined by a State Court (*Parker v. Illinois, supra*).

The State law basis for the judgment was not arbitrary or a mere device to prevent the review of a decision upon the Federal question. Accordingly, there is an adequate and independent basis in State law for the judgment of the New York Court of Appeals, and this Court should decline to review such judgment (*Fay v. Noia, supra*).

POINT II

The petition does not present a Federal question.

In order for petitioner to establish that this matter meets the jurisdictional requirements for this Court set forth in 28 USC 1257, it must be clear that either the validity of a treaty or statute of the United States is drawn in question, the validity of a State statute is drawn into question as being repugnant to the United States Constitution or the laws and treaties of the United States, or that a title, right, privilege or immunity is set up or claimed under the United States Constitution or treaties or statutes of the United States. There is no question of the validity of either a Federal or State statute raised in the decision of the New York Court of Appeals. The asserted ground for the relief requested is that petitioner has been denied a property right without due process of law in violation of the Fourteenth Amendment to the Constitution.

Petitioner's contention of a due process violation is premised upon her belief that her tenure rights were violated by the Fashion Institute of Technology when it declined to reinstate petitioner to a full-time position in 1967. However, at the time petitioner unsuccessfully attempted to return to the faculty of the Fashion Institute of Technology, she was not a tenured teacher. Consequently, there has been no deprivation of property without due process of law.

Petitioner's reliance upon the provisions of Education Law section 2587 is misplaced. The sole relevance of section 2587 to petitioner's claim against respondent board of trustees is petitioner's assertion that respondent allegedly violated her tenure rights when it concluded that petitioner had, in effect, resigned and given up her seniority rights, when she failed to return to employment upon the expiration of her maternity leave on or about February 1, 1965. However, the termination of the employment status of an individual who does not return from a leave does not involve a violation of tenure rights (*Matter of Thomas v. Board of Ed. Oceanside UFSD*, 58 AD 2d 584 [Second Dept., 1977]).

Petitioner's real grievance with respondent board of trustees was caused by a change in respondent's policy of reinstatement from one of unqualified eligibility for reinstatement in the same rank within 10 years, to a policy of reinstatement in the discretion of the president of the institution. The dispute over the effect of respondent's maternity leave and reinstatement policy has been resolved by respondent's agreement to reinstate petitioner as a tenured full-time assistant professor in February of 1973.

The ongoing dispute between petitioner and respondent board of trustees concerns the appropriate place-

ment of petitioner on respondent's salary scale, for which petitioner appealed to the Commissioner. Although petitioner continues to allege a violation of her tenure rights because of an alleged violation of the provisions of section 2587 of the Education Law, it is respectfully submitted that section 2587 is irrelevant to the dispute between petitioner and her employer, and that her cause of action is in reality premised upon the provisions of the contract between the Fashion Institute of Technology and the collective bargaining unit representing the teachers at such institution. The gist of petitioner's complaint is that she was not offered full-time employment at the appropriate level when she desired to be reinstated as a teacher at Fashion Institute of Technology. Such reinstatement is not dependent upon the provisions of section 2587, which does not authorize or require respondent board of trustees to reinstate a teacher who has resigned. Petitioner was reinstated within the discretion of the present of Fashion Institute of Technology in accordance with the bylaws and policies of the institution. Petitioner's right, if any, to challenge the action taken by the college president must be attributed to the grievance procedure in the contract between the college and its teachers, rather than to any provision of the Education Law.

Petitioner's arguments with regard to an alleged violation of her rights pursuant to subdivisions (8) and (9) of section 2587 of the Education Law simply ignore the fact that she failed to return from her extended maternity leave in 1965, and that such failure to return constituted a constructive resignation of her position with a loss of her tenure rights.

In the absence of any substantial Federal question, the petition for a writ of certiorari to the Court of Appeals of New York should be denied.

POINT III

Petitioner failed to assert on a timely basis any Federal question or claim.

Petitioner, who was a tenured employee of respondent Fashion Institute of Technology, left on maternity leave effective February 1, 1963 and continued to remain at home beyond the expiration of her maternity leave on January 31, 1965. She alleges that she was ready to return to full-time employment at Fashion Institute of Technology as of September of 1967. She returned on a part-time basis for one semester ending in January of 1968. Thereafter, she returned to full-time employment in February of 1973.

The appeal to the Commissioner was commenced on May 4, 1976, almost nine years after petitioner desired to return on a full-time basis but was not permitted to do so. The inordinate delay in seeking to vindicate her alleged tenure rights would prevent petitioner from successfully prosecuting her claim in any court of the State of New York.

The most appropriate method to review the refusal of the Fashion Institute of Technology to re-employ petitioner, particularly in view of petitioner's reliance upon the provisions of section 2587 of the Education Law, would have been by a special proceeding in State Supreme Court commenced pursuant to the provisions of Article 78 of the Civil Practice Law and Rules. Proceedings of this nature must be started within four months after the determination to be reviewed becomes final (Civil Practice Law and Rules section 217). In the alternative, petitioner could have pursued her claim of

unlawful discrimination by administrative appeal to the State Division of Human Rights, provided such claim were made within one year after the alleged unlawful discrimination (Executive Law, § 297[5]), or in an action in any court of appropriate jurisdiction for damages and such other remedies as may be appropriate, provided that an administrative appeal is not taken (Executive Law, § 297[7]). The latter provision of the Executive Law does not specify the time limitation for an action of this nature. However, the substance of the action, *i.e.* the relationship out of which the claim arises and the relief sought, is similar to that of a proceeding pursuant to Article 78 of the Civil Practice Law and Rules. Since there was some other form of judicial proceeding which was available, and for which there is a specific limitation period, the four month period within which to bring an Article 78 proceeding would apply to an action under Executive Law § 297(9) (*Solnick v. Whalen*, 49 NY 2d 224 [1980]). In the alternative, Civil Practice Law and Rules section 213(1) requires that an action must be commenced within six years if it is an action for which no limitation is specifically prescribed by law. Therefore, petitioner would be barred from litigating her claim by either time limitation.

Petitioner now claims reliance upon the provisions of 42 USC 1983 for the alleged violation of her civil rights. A cause of action based upon that statute could have been commenced in either the State Supreme Court, as the court of general original jurisdiction, or in the appropriate United States District Court (*Long v. District of Columbia*, 469 F. 2d 927 [D.C. Cir., 1972]; *Davis v. Towe*, 379 F. Supp. 536 [D.C. Va., 1974] affd. 526 F. 2d 588 [4th Cir., 1975]). The limitation upon the time to bring an action under 42 USC 1983 would be the same in

either the Federal or State forum because State law controls the limitations period for actions of this nature (*Wooten v. Sanders*, 572 F. 2d 500 [5th Cir., 1978]). The statute of limitations provided by the State for the analogous cause of action to that under § 1983 would be the appropriate period of limitation (*Eubanks v. Clarke*, 434 F. Supp. 1022 [D.C. Pa., 1977]). In this case, the analogous cause of action in New York would be that created by Executive Law section 297(9), which as discussed above would have a statute of limitations of four months (CPLR § 217), or of six years (CPLR § 213[1]).

From the foregoing, it is evident that petitioner waited far too long to assert her alleged cause of action involving a deprivation of civil rights or a taking of a property right without due process of law, in order to have a timely claim in any forum. Consequently, she may not attempt to raise a Federal question in this request for a writ of certiorari.

Conclusion

The judgment of the New York Court of Appeals has an adequate, independent basis in State law that petitioner selected the incorrect forum in which to litigate her claim against the Fashion Institute of Technology. The construction of the State statute conferring jurisdiction upon the Commissioner of Education to hear certain appeals is not a matter for this Court to review. In view of the fact that there is an adequate basis in State law for the judgment below, this Court does not have jurisdiction to consider the Federal question alleged by petitioner. The dispute between petitioner and the

Fashion Institute of Technology involves the placement of petitioner upon the appropriate level of the school's salary scale, which involves the interpretation of the contract between the school and its teachers. No substantial Federal question is presented. Any Federal question claim petitioner may have had was never litigated within the limitation for the time to commence an appropriate action or proceeding in the State of New York, and is therefore not properly before this Court.

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Dated: April 4, 1980.

Respectfully submitted,

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APPENDIX A

**Order of the New York Court of Appeals,
Dated December 17, 1979**

STATE OF NEW YORK,

Court of Appeals

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At a session of the Court, held at Court of Appeals Hall in the City of Albany on the seventeenth day of December A. D. 1979.

Present: HON. LAWRENCE H. COOKE,
Chief Judge, presiding.

Mo. No. 1140
In the Matter of the
Application of Frances Leto Zangrillo,
Appellant,

For a Judgment &c.

vs.

Gordon M. Ambach, as Commissioner of
Education of the State of
New York, *et al.*,
Respondents.

Appendix A—Order of the New York Court of Appeals, Dated December 17, 1979.

A motion for leave to appeal to the Court of Appeals in the above cause having been heretofore made upon the part of the appellant herein and papers having been submitted thereon and due deliberation thereupon had, it is

ORDERED, that the said motion be and the same hereby is denied with twenty dollars costs and necessary reproduction disbursements.

JOSEPH W. BELLACOSA,
Joseph W. Bellacosa,
Clerk of the Court.